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IN THE

Supreme Court of the United States

October Term, 1955.
No. 430

RICHARD THOMAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE E. DANIELSON,
JOHN J. HALL, and
GARY W. SAWTELLE,
650 South Spring Street,
Suite 1111,
Los Angeles 14, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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vs.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Richard Thomas prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 18, 1955.

Citation to Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix A hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 18, 1955. Rehearing was denied on August 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented.

1. Is the mere crossing of a state line by an individual, as an isolated act, without transporting any articles or other individual with him, interstate commerce?

2. Do the Federal Rules of evidence in a criminal case permit the Government to ask leading questions which assume controverted facts, when the Government fails to produce any evidence at the trial of the existence of said controverted facts?

Statutes Involved.

The statutory provisions involved are: 15 U. S. C., Sec. 77q(a)(2) and 18 U. S. C., Sec. 371. They are printed in Appendix B.

Statement.

Richard Thomas invented a process which converted ordinary black and white photographic film into color film [R. 339]. Over the period from 1937 to 1942, he had obtained five United States Patents covering this process [R. 194]. To go into business with this process (known as Thomascolor), Thomas formed a Delaware corporation which was named Thomascolor, Incorporated, hereinafter referred to as Thomascolor, Inc. [R. 154]. Thomas was the president of Thomascolor, Inc. [R. 115], which had offices and a plant in Los Angeles, California [R. 338]. In 1947, the corporation had a registration statement prepared for filing with the Securities and Exchange Commission as a preliminary to selling stock in Thomascolor, Inc., to the public [R. 96]. Ebasco Services, a corporation in New York which was a consulting firm of engineers, was called in by Thomascolor, Inc. [R. 63]. One Fred J. Almgren, an employee of

Ebasco Services during this period, handled the actual filing of this registration statement. The Securities and Exchange Commission reviewed the registration statement and raised a number of questions concerning the statement [R. 97].

Hearings then were held in which Almgren and Ebasco Services assisted Thomascolor, Inc. [R. 97]. In December, 1947, following these hearings, stock in Thomascolor, Inc., was approved for sale to the public [R. 97]. As a result of these hearings, a registration statement was prepared and allowed to become effective [R. 99]. Underwriters for Thomascolor, Inc., and the corporation itself attempted to sell stock in the corporation to the public [R. 97]. Because of drop in the stock market at that time, the public sale of stock in Thomascolor, Inc., was not successful, and in February or March of 1948, upon the recommendation of Ebasco Services, the registration statement was withdrawn and the stock was also withdrawn from public sale [R. 100]. However, before the withdrawal there were two small sales of stock [R. 101].

As a result of alleged sales subsequently made to Bailey Spencer and Jerome George, the Government instituted this action against Richard Thomas, petitioner herein, upon the return of an indictment by the Grand Jury charging Thomas and one Walter E. Powell with a violation of 15 U. S. C., Sec. 77q(a)(2) in three counts [R. 3, 7-8] and a violation of 18 U. S. C., Sec. 371 in a fourth count [R. 10]. The three counts under 15 U. S. C., Sec. 77q(a)(2) concerned fraudulent interstate transactions in the sale of securities, and the fourth count under 18 U. S. C., Sec. 371 concerned a conspiracy to violate 15 U. S. C., Sec. 77q(a)(2). After trial by jury, Thomas and Powell were found guilty as charged by the

three counts of violation of 15 U. S. C., Sec. 77q(a)(2), and not guilty as charged by the fourth count of violation of 18 U. S. C., Sec. 371 [R. 24]. The trial court pronounced judgment upon Thomas and committed him to custody of the Attorney General for a period of eighteen (18) months and fined him in the sum of $1,000.00 [R. 34]. Bailey Spencer, a Government witness at the trial, first met Thomas in the early part of January, 1949, at Phoenix, Arizona [R. 245]. Spencer had already heard of Thomascolor, Inc., from Walter Powell during the year 1948 [R. 245]. Spencer testified that he met Powell and Thomas at the Adams Hotel in Phoenix, Arizona, around January 1, 1949 [R. 258]. After this occasion, Spencer had no further conversation with Thomas [R. 270].

On January 3, 1949, at Spencer's home in Mesa, Arizona, Powell signed an agreement giving Spencer an option for a distributorship of Thomascolor in Arizona [R. 264]. Thomas was not present when the option was drawn up nor when it was signed [R. 263]. Spencer paid $3,000.00 for this distributorship [R. 282], by a personal check dated January 3, 1949. (Apparently, this is the $3,000.00 mentioned in Count Three of the indictment, for this is the only money which Spencer paid during the period from December 26, 1948 to January 15, 1949, as specified in this count.) This check was admitted into evidence as Government's Exhibit 25 [R. 268]. *The Government offered no evidence, and the record is silent, as to the means by which this check was transferred.* Presumably, Spencer handed the check over to Powell at Spencer's home on January 3, 1949. Spencer also testified that he made a loan of $15,000.00 to Thomascolor, Inc. [R. 281].

The only other check in the record given by Spencer was Government's Exhibit 26, which was dated February 27, 1948 [R. 250]. In his testimony, Spencer was confused as to the purpose of this check. He did testify that he had a conversation with Powell at Willcox, Arizona, in February, 1948 [R. 250]. Apparently, Thomas was not present [R. 251]. This conversation concerned the sale of stock in Thomascolor, Inc. [R. 251]. At this time, February, 1948, stock in Thomascolor, Inc., was being offered to the public under a duly authorized and effective registration statement [R. 99].

Jerome George, another Government witness at the trial, testified he first heard of Thomascolor through Powell [R. 298]. In December, 1948, George, his wife, and son, went to see the Thomascolor, Inc., plant in Los Angeles, California [R. 300-301]. There, George met Thomas and talked with him [R. 302]. George and his family returned to Arizona the same day [R. 310]. While in Thomas's office at the plant, George received a letter from Thomas which was Government's Exhibit 33 [R. 308-309]. The record does not contain any evidence that this letter was mailed. On New Year's eve of 1948, Thomas and Powell visited the Georges at their home in Phoenix, Arizona [R. 310]. On January 2 or 3, 1949, George met Thomas and Powell at Frank's Court, a motel in Willcox, Arizona [R. 313]. There George gave Powell $1,400.00 in cash and checks [R. 313]. One of these checks was Government's Exhibit 23 [R. 314]. The record does not show what other checks were given at that time and place.

Counsel for the Government and for Thomas and Powell stipulated that Mrs. George would testify that Govern-

ment's Exhibits 22, 24 and 35, were mailed by the Georges to Thomascolor, Inc. [R. 358]. However, the record does not show any evidence as to the purpose for which these exhibits were mailed nor what the Georges received in exchange for these exhibits.

The Government called Bailey Spencer to testify as to a conversation he had on January 1, 1949, with Powell and Thomas at the Hotel Adams in Phoenix, Arizona [R. 258]. Government counsel asked Spencer several questions about what was said during this conversation [R. 261]. Then Spencer indicated that his memory of this conversation was exhausted [R. 262]. Government counsel persisted in asking questions concerning what was said in this conversation, counsel for the defendants objected, and the trial court overruled the objections, ruling in effect that after a witness states that his recollection is exhausted, questions may still be asked of that witness to refresh his recollection of the conversation at issue [R. 262]. The court made the same ruling in a later portion of the testimony of Bailey Spencer upon objection of counsel for the defense [R. 273]. By these rulings, the court permitted Government counsel to ask questions which were extremely leading and suggestive to the witness, and highly prejudicial to Thomas before the jury. Many of these questions assumed facts not in evidence, facts of which the Government had the burden of proof, and failed to prove beyond a reasonable doubt.

The Government called Jerome George to testify as to conversations he had with Thomas or Powell or both [R. 317].

Government counsel then asked said witness questions which assumed facts not in evidence, questions which were

leading and suggestive, and highly prejudicial to Thomas before the jury.

The Court below affirmed the verdict and judgment of conviction of petitioner in the District Court.

Reasons for Granting the Writ.

1. There was no movement of securities in interstate commerce. The indictment did not charge, and the Government did not prove, that securities were actually transported in interstate commerce during the period alleged in the indictment. The Government fail to show at the trial any prospectus or letter or communication relating to the sale of securities in interstate commerce.

The indictment charges as a basis for interstate commerce only that an individual person passed from one state to another. Whether this event is interstate commerce within the meaning of Section 77q(a)(2) should be decided by this Court.

We are aware that ever since *Gibbons v. Ogden* (1824), 9 Wheat. 1, the scope of the commerce power under the Constitution of the United States has been expanding, and that it is plenary in nature. However, we know of no case specifically holding that the mere crossing of a state line by an individual, as an isolated act, without transporting any articles or other individual with him, is interstate commerce.

This Court has not yet gone that far, but has stopped with the cases on transportation of liquor by individuals:

United States v. Hill (1910), 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678;

United States v. Simpson (1920), 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665.

In the instant case, nothing other than the person of petitioner crossed a state line. No case has yet held that this alone constitutes interstate commerce. The Court below, in affirming the judgment of the District Court, necessarily assumed that this alone constitutes interstate commerce.

Because of the importance of this question of interstate commerce, we urge this Honorable Court to grant this petition for writ of certiorari.

2. The decision of the Court below does not discuss the important question of whether the Federal Rules of Evidence in a criminal case permit the Government to ask leading questions which assume controverted facts, when the Government fails to produce any evidence at the trial of the existence of said controverted facts.

We submit that the settlement of this question by this Court is plainly in the public interest, for such a question is very likely to arise in criminal cases in Federal Courts.

Furthermore, the opinion of the Court below conflicts with an earlier decision of the same Court, to wit, the decision in the case of *Sheridan v. United States* (1940), 112 F. 2d 503, 504 (C. C. A. 9).

In that case, the said Court of Appeals held that leading questions assuming controverted facts are objectionable and should not be permitted.

We submit that the proper administration of justice in the Federal Courts in criminal cases demands that this Honorable Court settle the foregoing question, which has never been decided, to our knowledge, by this Court or any other Circuit. To assure a fair trial to defendants in Federal Courts, we submit that this Court take upon itself to settle this question.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE E. DANIELSON,
JOHN J. HALL, and
GARY W. SAWTELLE,
By GEORGE E. DANIELSON,
Counsel for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Richard Thomas, Appellant, vs. United States of America, Appellee. No. 14,355.

Dated: May 18, 1955.

Upon Appeal from the United States District Court for the District of Arizona.

Before: STEPHENS and FEE, Circuit Judges, and WIIG, District Judge.

JAMES ALGER FEE, Circuit Judge:

Richard Thomas and Walter E. Powell were convicted after a trial before a jury on three counts of an indictment charging violations of 15 U. S. C. A. §77(q)(a)(2), which reads:

> "(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly * * *
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

They were acquitted upon Count 4, which charged conspiracy between these defendants to commit the substantive offenses. Powell does not appeal.

Counts 1 and 2 were based upon the same alleged sale of common stock of Thomascolor, Inc., to Jerome K. George and Myrtle T. George for $3,500.00 by means of untrue statements of material facts known by defendants to be untrue when made and by omissions to state material facts, which representations and omissions are alleged in detail. The difference between these two counts is that, in the first, use of the mails in the consummation of the sale is alleged, and, in the second, use of means and instruments of transportation is set up, in that defendants caused Powell to travel by commercial airline from Los Angeles to Phoenix.

Count 3 set up a similar sale of securities to Bailey Spencer, with alleged untrue statements of material facts and alleged omissions to state material facts, wherein it was also set up that in this sale defendants caused Thomas to travel by private motor vehicle from the vicinity of Los Angeles to Phoenix and Willcox, Arizona.

The evidence shows the following situation: Thomas invented a color photographic process which was patented. He organized Thomascolor, Inc., of which he was president, to exploit the process. This corporation prepared a statement for filing with the Securities and Exchange Commission. Ebasco Services were employed to review the statement, assist in obtaining registration and for further services. In December, 1947, following hearings, sale of securities was approved. There were only two small sales of stock. Upon recommendation of Ebasco, the registration statement was withdrawn about March, 1948. There were efforts to obtain private financing without public sale of stock until the summer of 1949. Thomascolor was in bad financial condition during the

latter period, if it was not then insolvent, of which condition there was evidence.

The evidence as to the incidents upon which the charges were based is briefed here. On December 29, Mr. and Mrs. George were in Los Angeles, California. On the evening before, Powell, calling on long distance telephone from Los Angeles to Mr. George in Phoenix, had first mentioned Thomascolor, inquiring whether the latter was satisfied with his job, and asked him to come to California as Powell had something good for him. There Powell introduced Thomas to George, and the two defendants, in a lengthy conversation, induced the Georges to buy stock in the corporation by means of representation shown to be false. The purchase agreement was prepared in the office of Thomas on the letterhead of Richard and bears his signature. The stock offered for sale is therein described as personally owned by Thomas. This offer was accepted according to its terms by the signature of George. Later that day, Powell traveled by plane with the Georges from Los Angeles, California, to Phoenix, Arizona, where he registered at the Adams Hotel. He next appeared with Thomas at the residence of the Georges in Phoenix on the evening of December 31, 1948. Thomas was at that time also registered at the same hotel. Powell and Thomas talked to Bailey Spencer concerning the purchase of stock in Thomascolor at this hotel in Phoenix on the next day, January 1. They further made representations to Spencer at his home on January 3, and there received his check for stock. On January 4, Thomas and Powell were registered at Frank's Auto Court, at Willcox, Arizona, with a Cadillac car bearing California License No. 445166. At this time, they obtained approximately fourteen hundred dollars from the Georges. However, the Georges advised they had not been able to raise

the entire purchase price, and defendants instructed them in Arizona to mail the balance of the money to the Thomas color address in Los Angeles, which the Georges later did. The stock certificates delivered to the Georges were in the name of Thomas and endorsed by him. Both Thomas and Powell had a conversation with Spencer in Phoenix at the Adams Hotel concerning the purchase of stock about January 1, 1949. Powell later called at Spencer's home at Willcox on January 3, 1949, where he delivered a distributorship agreement and picked up Spencer's check for $3,000.00, made payable to Thomas at Powell's instruction, in payment for the stock and distributorship. The check is endorsed "Richard Thomas." The stock certificates were later delivered to Spencer by mail.

The sufficiency of the indictment was not raised. However, this process was extremely inartistic. The single transaction of the sale of the stock to the Georges is divided between two counts in order to relate this unified transaction, first, with use of the mails and, second, with the use of means of transportation in interstate commerce. Since it was unchallenged, fair notice was given to defendant, and conviction was on both of these counts, it is unnecessary to decide what would have been the situation if there had been conviction on only one of these practically identical charges. The charge of Count 3 was necessarily separate, as it related to a sale of a different block of stock to Spencer. All of the use of means of transportation could have been specified for this sale as well as the sale to George. In any event, the specification of use could be treated as surplusage. The trial judge did not so treat either of the counts, but left the jury to determine guilt or innocence as to each. The judge gave instructions

on this whole complex subject, which were models of clarity and to which no exceptions were taken. As part of the elaborate charge, the court instructed as follows:

> "As to each of the first three counts, therefore, the Government must establish beyond a reasonable doubt that the securities were sold and the purchaser's cash and checks obtained, were obtained by the misrepresentation or concealment of a material fact or facts, and that the mails or a means of transportation in interstate commerce were used in connection therewith. The sale and obtaining of the purchaser's cash and checks, the misrepresentation and the use of the mails or means of interstate commerce, are all essential elements of the offenses alleged under the first three counts of the indictment."

There are several questions raised. First, it is said there was not sufficient evidence to be submitted to the jury to establish that the instruments of transportation and communication in interstate commerce were used to consummate the crime or that the mails were used in that connection. Second, it is contended there was not enough evidence to convict on any count. Third, the claim is made that, since Thomas was found not guilty on the conspiracy count, the verdicts of guilty against him on the substantive counts were inconsistent. Finally, error is predicated upon the allowance of questions by the government to refresh the memory of its witnesses upon direct examination.

The first question relates to the proof of the "use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails directly or indirectly" in the sale of securities. The element must be proved to the satisfaction of the jury beyond a reasonable doubt or there could be no conviction. No exception

was taken to the instructions of the court regarding the use. The sufficiency of the evidence to establish these allegations of the indictment is challenged.

But there was evidence as to each count, which, if believed by the jury, would have so proved such allegations as to such use. It was, it is true, not direct testimony, but was indirect in its character. This did not prevent its acceptance by that body. It was of such a character that it might well have produced conviction in an impartial mind that such means or instruments of transportation or the mails, interstate, were made use of by Thomas. The connected story has been set forth in this regard. A review of the record convinces this Court that there was evidence from which the jury could reasonably have found that defendants caused Powell to travel by commercial airline from Los Angeles, California, to Phoenix, Arizona, about December 29, 1948, and Thomas to travel from some place in California near Los Angeles by private motor vehicle to Phoenix and Willcox in Arizona about December 30, 1948. But the use of the mail to send three checks from Arizona to Thomascolor, Inc., in California, was conclusively established by the testimony, the checks and return registry receipt. This was pursuant to the agreement made when Powell and Thomas called upon George at Willcox to get the money, and he advised them that he had been able to raise only $1,400.00. There is a stipulation that Mrs. George, if called as a witness, would testify that thereafter the three checks above mentioned were mailed by the Georges from Arizona to Thomascolor, Inc., in California, pursuant to instructions from Thomas and Powell, and that the registry return receipt evidences this mailing. George identified one of the checks and his signature on the back of it, and the endorsements

on all three checks were shown to be the signature of Thomas. There was no stipulation that the testimony of Mrs. George was true, but it is the only evidence in the record on the subject and was certainly sufficient for the jury to conclude from the instructions of the court that the mailing was so accomplished, especially since there is no contradictory evidence in the record.

It is true that the use of the mails was alleged and proven only as to one count of the indictment. However, the transactions were interwoven. Since the verdict and sentence on the three counts was imposed generally and was not beyond what any one count would sustain, if sufficiently proved, there is no necessity to go further. United States v. Nemec, 9 Cir., 191 F. 2d 810; Baker v. United States, 5 Cir., 156 F. 2d 386; Harper v. United States, 8 Cir., 143 F. 2d 795.

As to the first two counts, the evidence as to other features was amply sufficient to sustain a conviction. There could be no doubt that the money and checks transmitted by mail, as described in the testimony which it was agreed that Mrs. George would give, were part payment in a sale of the securities described in the indictment. The money was paid on account of the stock purchase agreement drawn and signed by Thomas on his own letterhead at the Thomascolor offices for the sale of his personally owned stock. On cross-examination of George, it appeared that the promise of a job was held out as an inducement to get him to buy these securities. Of course, the existence of such an inducement would not destroy the sale. The evidence shows that Spencer was given a written option for a distributorship as an inducement to the purchase of more stock, but there was still a sale. Under the statute, "any security given or delivered with or as a

bonus on account of any purchase of securities or any other thing shall be conclusively presumed to constitute a part of the subject of such purchase and have been offered or sold for value." 15 U. S. C. § 77(b)(3). Any attempt to conceal the sale by such devices is not countenanced by the statute. But here there could be no other satisfactory explanation of the transaction.

There was also evidence to support the allegations of the indictment that Thomas and Powell, jointly, willfully and knowingly made untrue statements of the material facts and omissions to state material facts which resulted in sales of stock to the Georges and Spencer.

The jury failed to convict on the conspiracy count, and it is claimed there is an inconsistency. Verdicts on different counts need not be consistent. Besides, there was here no inconsistency shown. Allen v. United States, 9 Cir., 186 F. 2d 439.

It appears that the United States Attorney was permitted to suggest circumstances which refreshed the memory of witnesses after each had stated positively that his memory on the subject was exhausted. In each instance, the witness testified to further facts after his memory was refreshed. The trial judge has wide limits of discretion in such a matter, and we are not inclined to establish barriers except in case of clear injustice, which most certainly is not present here. Wigmore on Evidence (3rd Ed.), §§ 772, 777.

The able trial judge was fair and impartial. Defendant was convicted upon sufficient evidence.

Affirmed.

(Endorsed:) Opinion. Filed May 18, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B.

15 U. S. C., Sec. 77q(a)(2):

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly . . .

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

18 U. S. C., Sec. 371:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both."

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In the Supreme Court of the United States

No. 430

RICHARD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 427-433; Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1955 (R. 434), and a petition for rehearing was denied on August 29, 1955 (R. 435). The petition for a writ of certiorari was filed on September 28, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether travel of individual defendants at different times across state lines as part of their

activities resulting in an unlawful sale of securities constituted use of the instrumentalities of interstate commerce in the sale of securities within the purview of Section 17(a)(2) of the Securities Act of 1933.

2. Whether the trial court abused its discretion in permitting the prosecutor to ask leading questions of government witnesses.

STATUTE INVOLVED

Section 17(a)(2) of the Securities Act of 1933, 48 Stat. 74, 84, 15 U.S.C. 77q (a)(2), provides:

> FRAUDULENT INTERSTATE TRANSACTIONS
>
> Sec. 17(a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly——
>
> * * * * *
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, * * *.

Section 24 of the Securities Act of 1933, 48 Stat. at 87, 15 U.S.C. 77x, in pertinent part provides:

> PENALTIES
>
> Sec. 24. Any person who willfully violates any of the provisions of this title, * * * shall

upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner and one Powell were convicted (R. 24-25) under three counts of an indictment (R. 3-12) returned in the United States District Court for the District of Arizona, charging fraudulent sales of securities by use of the mails and the means of interstate commerce in violation of Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. 77q(a)(2). The first two counts (R. 3-8) were predicated upon the same sale of Thomascolor, Inc., stock to a Mr. and Mrs. George by means of untrue statements and omissions of material facts. The difference between the first two counts was that the first alleged use of the mails in consummating the sale (R. 7), while the second alleged use of a means of interstate transportation, in that the defendants caused Powell to travel by commercial airliner from Los Angeles, California, to Phoenix, Arizona (R. 8). The third count charged a similar fraudulent sale of stock to one Bailey Spencer, and alleged that in this sale the defendants caused petitioner to travel by private motor vehicle from Los Angeles to Phoenix and Wilcox, Arizona (R. 8-10). The two defendants were acquitted (R. 24-25) on a fourth count (R. 10-12) which charged a conspiracy to commit the three substantive offenses.

Petitioner was given a general sentence of imprisonment for 18 months and fined $1,000 (R. 34-35). Only petitioner appealed (R. 36). His conviction was unanimously affirmed (R. 434).

1. The evidence adduced at the trial was substantially undisputed. In so far as here pertinent, it may be summarized as follows:

Petitioner had invented a photographic process for converting black and white film to color film, and formed a corporation known as Thomascolor, Inc., of which he was president (R. 339, 154, 115). In 1947, Thomascolor attempted public financing and filed a registration statement with the Securities and Exchange Commission (R. 96-97). Following the termination of stop order proceedings, the registration was allowed to become effective (R. 97, 99). The offering was unsuccessful, and only two or three small sales of the stock were made (R. 100-101). In February or March 1948, the registration statement was withdrawn (R. 99-101). Thereafter, Ebasco Corporation, a consulting firm of engineers, attempted unsuccessfully to obtain private financing for Thomascolor (R. 63, 66, 67, 85, 95-96). Ebasco did not agree to list Thomascolor stock on the New York Stock Exchange, and no such listing was made (R. 85, 195-196).

Gov. Ex. 1, an Ebasco report regarding Thomascolor, completed in November 1948 and reviewed by petitioner and Powell (R. 15, 70, 72, 73-74, 78-79), showed, *inter alia,* that "[a]t no time has commercial production been undertaken nor has any income of consequence resulted to any of the companies or syndicates"; that "[f]or all practical purposes the company is and has been insolvent since December, 1947" (R. 76); and that "unless prompt and concerted action is taken, receivership seems inevitable" (R. 77). Eventually bank-

ruptcy proceedings were filed against Thomascolor (R. 192).

a. *The George sale.*—In December 1948, Powell in Los Angeles telephoned George in Phoenix asking that he come to California to investigate a good job with Thomascolor (R. 298-299). George and his wife flew to California (R. 300). The next day, they went with Powell and petitioner for an inspection tour of the Thomascolor plant (R. 300-302). Both petitioner and Powell specifically told Mr. and Mrs. George that the Thomascolor stock had been underwritten by Ebasco for six dollars per share; that it would go on the New York Stock Exchange on March 15, 1949; and that the company would go into production within ninety days (R. 303, 304-305, 319, 355-356). George was promised a salary of about $600 a month and was asked to purchase stock to show his faith in the company (R. 302, 304). On December 29, 1948, George, in writing (Gov. Ev. 33; R. 20, 308), agreed to purchase from petitioner's personal stockholdings 1,000 shares of Thomascolor stock for $5,000 (R. 308-309, 305). On that same afternoon Powell returned by airplane with the Georges to their home in Phoenix (R. 310).

Petitioner and Powell came to George's home at Phoenix on January 1, 1949, and urged him to raise the $5,000 as soon as he could (R. 310-312). On January 2 or 3, at Frank's Auto Court in Willcox, Arizona, George gave Powell in petitioner's presence $1,400 as partial payment for the stock (R. 312-313). A stipulation was entered into by counsel that Mrs. George, if called as a witness,

would testify substantially as her husband had, and would also testify that three checks (Gov. Exs. 22, 24, 35; R. 20, 357-358) were mailed by the Georges from Phoenix to Thomascolor in Los Angeles pursuant to instructions from petitioner and Powell (R. 356-358, 361-362). George identified Gov. Ex. 22 and his signature on the back of it (R. 315, 316), and petitioner's secretary identified the indorsements on Gov. Exs. 22 and 24 as petitioner's (R. 224-225).

b. *The Spencer sale.*—On January 1, 1949, Spencer met petitioner and Powell at the Hotel Adams in Phoenix at Powell's invitation to discuss purchase of Thomascolor stock (R. 258-259). Both petitioner and Powell specifically stated that the company was ready to go into production within thirty days and that its financing had been completed (R. 261-262). On January 3, 1949, at Willcox, Powell delivered a distributorship option agreement (Gov. Ex. 30; R. 18, 264) to Spencer, and received Spencer's check for $3,000 (Gov. Ex. 25; R. 19, 268), made payable to petitioner at Powell's instruction, in payment for the stock and distributorship (R. 263, 264, 266, 267-268, 270). This check was given to Powell in petitioner's presence (R. 286-287), and was indorsed by petitioner (R. 225). Later Spencer received the stock certificates in the mail (R. 19, 268-269).

2. The facts relating to (a) the trial court's rulings as to the propriety of certain questions challenged by petitioner as leading and suggestive, and (b) the context in which these questions were asked, are set forth, *infra* at pp. 8-11.

ARGUMENT

1. The principal question raised by the petition for certiorari (Pet. 2, 7-8) relates to whether the travel of petitioner and his co-defendant Powell from California to Arizona, in selling the Thomascolor stock to the defrauded purchasers, constituted a use of the instrumentalities of interstate commerce within the meaning of Section 17(a)(2) of the Securities Act of 1933 (*supra*, p. 2). The question is not properly subject to review by this Court, since petitioner is in no position to, and does not in his petition, attack (a) the sufficiency of the first count, which alleged the use of the mails in violation of the Securities Act, or (b) the existence of evidence that the mails were in fact used by the Georges in paying for their stock (*supra*, pp. 5-6; R. 356-358, 361-362; cf. R. 431). Since petitioner was convicted under the first count and his general sentence (R. 34-35) was less than the maximum prescribed in Section 24 of the Securities Act (*supra*, pp. 2-3), the conviction is sustainable under that count alone. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1.

In any event, the contention is without substance. Section 17(a)(2) (*supra*, p. 2) proscribes the unlawful sale of securities "by the use of any means or instruments of transportation or communication in interstate commerce * * *." It does not require that securities or a prospectus shall them-

selves move interstate.[1] It requires merely that either the mails or some means or instrument of interstate commerce be used in effectuating a fraudulent sale of securities. Hence it does not exclude from its coverage the interstate transportation of an individual for the purpose of consummating an unlawful sale.

The transportations alleged in the indictment were for the specific purpose of effecting the fraudulent sale, and were an integral part of the venture. They were, therefore, within the terms of the statute. "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution." *Associated Press* v. *Labor Board*, 301 U.S. 103, 128. See also *United States* v. *Shubert*, 348 U.S. 222, 226-227.

2. While Spencer was being examined as to his conversation with petitioner and Powell leading

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[1] *United States* v. *Monjar*, 47 F. Supp. 421, 425 (D. Del.), affirmed, 147 F. 2d 916 (C.A. 3), certiorari denied, 325 U.S. 859; *Coplin* v. *United States*, 88 F. 2d 652, 657-658 (C.A. 9), certiorari denied, 301 U.S. 703 (use of telephone to solicit purchase without transmittal of security); *Kopald-Quinn & Co.* v. *United States*, 101 F. 2d 628, 630, 632-633 (C.A. 5), certiorari denied, *sub. nom. Ricebaum* v. *United States*, 307 U.S. 628 (mailing of confirmation and not the security).

Cf. *Harper* v. *United States*, 143 F. 2d 795, 801, 802 (C.A. 8) where several counts of an indictment alleged fraudulent sale of securities by defendants by "means and instruments of transportation in interstate commerce by transporting in an automobile *themselves* and certain named persons to be defrauded." (Emphasis added.) The convictions were affirmed, although the court found it unnecessary, by reason of the validity of other counts, to decide expressly whether it was necessary that there be an actual attempt to offer the security either by the transportation in interstate commerce of a prospectus or the security itself.

up to the stock sale, he was asked if anything was "discussed there concerning financing of the company". Over objection that the question was leading and suggestive, the court ruled that when a witness states, "that is about all", it is permissible to refresh his recollection. It allowed the witness to answer that representations were made that the financing had been completed (R. 262). Later the court permitted a question as to whether statements had been made that the company had been insolvent, and Spencer answered in the negative (R. 272-274). As to this the court instructed the jury (R. 273):

> Ladies and gentlemen, the question which counsel is now asking, is only for the purpose of permitting, of getting the whole conversation from this witness. The jury is not to interpret the fact, that the question is asked, that it has been established, that any of the facts assumed in the question have been established. In other words, it is solely and only for the purpose of exhausting the witness' recollection.

Spencer was allowed to answer and stated that petitioner and Thomas did not tell him that the corporation had for many months been insolvent or that it was indebted for a sum in excess of $400,000 (R. 273-275). After a similar defense objection, the court charged (R. 274): "* * * the jury is instructed that they are not to assume from the asking of the questions, the facts cited in the questions. The facts are not established. It is

only and solely for the purpose of exhausting the witness' recollection."

A similar line of questioning with negative answers was permitted over objection in George's testimony (R. 317-320).

It was well within the sound discretion of the court to permit the questions in the context in which they were asked. Cf. *Northern Pacific Railroad* v. *Urlin*, 158 U.S. 271, 273; *United States* v. *Graham*, 102 F. 2d 436, 441 (C.A. 2), certiorari denied, 307 U.S. 643. The question to Spencer as to whether financing was discussed did not suggest the answer given—that the statement was made that the financing had been completed. As to the questions which are alleged to have assumed facts, such as whether the indebtedness had been revealed, they all related to express averments in the indictment as to omissions of material facts (R. 4, 5, 6). The logical manner of proving that the defendants, in their conversations with Spencer and George, omitted certain facts specified in the indictment, was to ask them directly if the conversation covered these. Otherwise the jury might not be reasonably certain as to whether these statements were or were not omitted. Cf. Wigmore on *Evidence*, 3rd ed., § 664.

Although the questions were based on the evidence previously introduced,[2] the court was care-

[2] Evidence had been introduced to the effect that the company was insolvent and had liabilities of $400,000 (R. 76, 73-74); and that the company had unsuccessfully attempted to obtain both public and private financing (R. 63, 66, 67, 76, 85, 100-101).

ful to instruct the jury that they were not to assume *from the questions* that the facts embodied therein had been established (R. 273, 274).

CONCLUSION

The decision below is correct and is in full accord with the applicable decisions of this Court. There is no conflict among the circuits; no important question is raised; and there is no occasion for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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